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No. 10-376

In The Supreme Court of the United States

MARK WRISLEY, et al.,

Petitioners,

v.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The time has come for this Court to resolve the questions left unanswered in *Chavez v. Martinez*, 538 U.S. 760 (2003).

Since *Chavez*, at least six circuit courts have split on whether police officers should face civil liability under the Fifth Amendment for the pre-trial use of allegedly coerced confessions. The Ninth Circuit and two additional circuits say pre-trial use of a coerced confession can lead to liability, while three other circuits hold that only trial use suffices.

Respondents contend that if one examines under a microscope the three opinions disagreeing with the Ninth Circuit and holding that trial use is a prerequisite to liability, one would discover a disagreement only in dicta. Respondents make this argument because they cannot dispute the plain language of those opinions, which contrary to the Ninth Circuit here, states the elements of a Fifth Amendment claim in their respective circuits as requiring use at trial. *See Murray v. Earle*, 405 F.3d 278, 289 (5th Cir. 2005) ("*at trial*" use required); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) ("*trial* action" required); *Renda v. King*, 347 F.3d 550, 559 (3rd Cir. 2003) ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution").

The language of the circuit opinions requiring use at trial for Fifth Amendment liability – as explained below – is not dicta. Indeed, the Ninth Circuit

has cited these opinions in acknowledging the "mixed results" in the circuits over the use question. *Stoot v. City of Everett*, 582 F.3d 910, 924 (9th Cir. 2009). But even if the at-trial requirement in these opinions was dicta, it guides the actions of public officials living and working in at least fifteen states. Do respondents really contend that a police officer in Philadelphia, Richmond, or New Orleans should not only be responsible for knowing what constitutes clearly established law, but also when to ignore the plain language of their courts? Only this Court can eliminate the uncertain and contradictory standards currently being applied throughout the country and set the proper rule for all courts and public officials.

Regardless of its answer on the use question, this Court must also resolve the other Fifth Amendment matter left open in *Chavez*, which is the second question presented by petitioners. Given the fractured Court in *Chavez*, there is no clarity on the question whether a police officer who interviews a suspect in violation of the Fifth Amendment is automatically exposed to civil liability, or whether the officer's conduct must also "shock the conscience" to open him up to a damages action.

Respondents ignore this vital question of Fifth Amendment liability standards, contending it is irrelevant given the Ninth Circuit's holding that the evidence in this case supports a finding that the interrogations meet the (more stringent) shocks-the-conscience test. But this only begs the question of whether that holding was correct, which is the third

question presented. In any event, even if this Court were to agree with the Ninth Circuit's characterization of the interviews as conscience-shocking, it should reject the Ninth Circuit's conclusion that an invalid confession – regardless of circumstances – can automatically yield a civil claim.[1]

Finally, as to petitioners' third question presented – i.e., whether the Ninth Circuit properly applied the Fourteenth Amendment – respondents cite no authority supporting the court's controversial holding that words alone can yield civil liability. They offer cases that stress consideration of a suspect's age when reviewing incriminating statements. But those cases concern only whether the statements should be suppressed as evidence at a suspect's criminal trial, not whether police should be liable for damages.

Here, three Ninth Circuit judges found the questioning conscience-shocking, but the district court judge flatly disagreed. At a minimum, the matter should not be left to the varied sensibilities of individual judges. Rather, this Court should determine whether verbal conduct alone can meet a

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[1] Respondents likewise defend the Ninth Circuit's erroneous use of the "unwarranted interference" test for familial companionship due process claims by contending the court's shocks-the-conscience holding makes any use of this (lower) standard immaterial. But this again begs the question whether that holding was correct and also leaves unaddressed for future parties the Ninth Circuit's erroneous test for companionship claims.

shocks-the-conscience test that was developed chiefly for cases involving physical harm, particularly where, as here, there is no finding of intentional or severe suffering devoid of any valid public interest.

I. REVIEW IS NEEDED TO DETERMINE WHETHER POLICE ARE SUBJECT TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT FOR COERCIVE QUESTIONING WHENEVER THE STATEMENTS THEY OBTAIN ARE USED IN COURT.

Justice Thomas observed in *Chavez* that because there was majority agreement that the pre-charge questioning there did not violate the Fifth Amendment, "[w]e need not decide today the precise moment when a 'criminal case' commences" under that Amendment. 538 U.S. at 766-67. Justice Souter referenced "the core guarantee" of the Fifth Amendment, but refrained from speculating further on post-charge use. *Id.* at 778 (Souter, J., concurring). Yet that issue, described by circuit courts as "open," "unanswered," or "the gray area created by *Chavez*," has festered with "mixed results" squarely presented here. *Renda*, 347 F.3d at 559; *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1025-26 (7th Cir. 2006); *Stoot*, 582 F.3d at 923-26; *see also Higazy v. Templeton*, 505 F.3d 161, 172 (2nd Cir. 2007); *Murray*, 405 F.3d at 289; *Burrell*, 395 F.3d at 514.

Respondents try to minimize the split in authority by claiming the cases opposed to the Ninth Circuit do not in fact involve pre-trial use. (Crowe Opp.

11-19; Houser Opp. 20-27.) Respondents misread the cases. The Third Circuit in *Renda* expressly observed that, unlike the statements in *Chavez*, those by Renda were used to file charges, but the court still rejected liability based on no trial use. 347 F.3d at 558-59.[2] Likewise, in the course of rejecting liability for pre-trial use of an interrogation, the Fourth Circuit in *Burrell* observed, "[u]nlike in *Chavez*, criminal charges *were* ultimately brought against Burrell." 395 F.3d at 513 n.4. Finally, the Fifth Circuit in *Murray* articulated a multi-part test for civil liability, which "require[d]" Murray to establish her coerced statements were used "*at trial*." 405 F.3d at 289. The fact that Murray failed to meet a separate element of the Fifth Circuit's test – proximate causation – does not make its test dicta. *See Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000) (observing that *stare decisis* requires fidelity of future

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[2] The Crowe respondents claim *Renda* is limited because it concerns only *Miranda* violations, which they argue fail to establish liability in any event given this Court's "later decision in *Chavez*." (Crowe Opp. 13.) But not only was *Renda* decided after *Chavez*, the *Miranda* violations in *Chavez*, unlike in *Renda*, never led to criminal charges. The Houser respondents also try to limit *Renda* by criticizing its reliance on an identical holding in *Giuffre v. Bisell*, 31 F.3d 1241 (3rd Cir. 1994). They contend if the *Renda* court had only considered this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000), which reaffirmed *Miranda*, it would have rejected *Giuffre*, which had doubted *Miranda*'s constitutional force. (Houser Opp. 21.) They are wrong. The *Renda* court expressly stated that despite *Dickerson*, "it is clear that *Giuffre* still is good law." 347 F.3d at 557.

circuit panels to both the results and principles of law from prior panel decisions).[3]

Moreover, even if particular facts could distinguish some of these cases on the use issue, there is no denying the unequivocal statements of law by these courts – in direct conflict with the Ninth Circuit here, the Second Circuit in *Higazy*, and the Seventh Circuit in *Sornberger* – that no liability arises under the Fifth Amendment absent use of illicit statements at trial. *See Murray*, 405 F.3d at 289 (coerced statement must "later be introduced against [plaintiff] *at trial*" for liability to arise); *Burrell*, 395 F.3d at 514 (without "*trial* action," claim fails "*ipso facto*"); *Renda*, 347 F.3d at 559 ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution"); *see also McKinley v. City of Mansfield*, 404 F.3d 418, 430 n.11 (6th Cir.

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[3] Under respondents' view of dicta, only cases that are factually identical would be binding authority. This is an incorrect application of the concept. *See Gochicoa*, 238 F.3d at 286 n.11 (dicta is limited to statements that can be omitted "'without seriously impairing the analytical foundations of the holding'") (quoting *In re Cajun Elec. Power Coop., Inc.*, 109 F.3d 248, 256 (5th Cir. 1997)). Moreover, at least one court has addressed a Fifth Amendment claim based on the exact situation here – i.e., allegedly coerced statements used to indict but suppressed at trial, where plaintiff was then acquitted – and squarely disagreed with the Ninth Circuit's position, rejecting the claim for lack of trial use. *See Offineer v. Kelly*, No. 09CV493, ___ F.Supp.2d ___, 2010 WL 3860611, *11 (S.D. Ohio Sept. 24, 2010).

2005) ("thrust" of *Chavez* is that Fifth Amendment is only a "trial protection").

The contradictory approaches taken in the circuits – whether in dicta or in a holding – are of particular concern in the qualified immunity context, where a court's opinion affects not only the litigants in a given case but all police activity in that circuit. The discretion afforded to police turns on their understanding of "clearly established" rights. *Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009). To expect police to ignore clear statements of law by courts under which they perform their duties is absurd. Any reasonable police officer would recognize the circuit split on pre-trial use liability under the Fifth Amendment even if respondents would have this Court ignore it.

II. REVIEW IS NEEDED TO DETERMINE WHAT TYPE OF ACTIVITY CAUSES POLICE TO BE EXPOSED TO CIVIL LIABILITY UNDER THE FIFTH AMENDMENT.

In holding the pre-trial use of questioning in this case can result in civil liability under the Fifth Amendment, the Ninth Circuit adopted "mere coercion" as its substantive test. (Pet. App. 36.) The court observed, "a Fifth Amendment cause of action . . . arose when Michael and Aaron's *coerced statements* were introduced." (*Id.* at 44, emphasis added.) And, with regard to qualified immunity, the Ninth Circuit held the Escondido police officers should have known civil liability would arise as soon as they "employed

coercive means to compel a statement." (*Id.* at 44-45.) At no point did the Court of Appeals suggest petitioners' conduct must also "shock the conscience." (*See id.* at 45-48.)[4]

As described in the petition, both the plurality opinion of Justice Thomas and the concurring (and controlling) opinion of Justice Souter in *Chavez* suggest that constitutional claims based on the nature of police conduct during an interrogation should be governed by substantive due process standards, not technical violations of the Fifth Amendment. (Pet. 25-26, citing *Chavez*, 538 U.S. at 773, 779 (Souter, J., concurring).) The definitive test nevertheless remains an unresolved question on which courts of appeal are split. *Compare* Pet. App. 39-45 (using "mere coercion"), *with Murray*, 405 F.3d at 290 nn.39-40, 52 (considering police conduct a Fourteenth Amendment issue). If the Ninth Circuit's view prevails, police could face a civil lawsuit whenever a suspect's statement is subject to suppression – broadening liability well beyond what the majority of justices believed appropriate in *Chavez*.

Respondents never address the explosive expansion of civil liability endorsed by the Ninth Circuit's

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[4] By reversing summary judgment on the Fifth Amendment claim based on the questioning of Houser, whose incriminating answers, if any, were suppressed for his criminal trial not because of coercion but for failure to give *Miranda* warnings (*see* Pet. App. 32), the Ninth Circuit suggests even a mere *Miranda* violation can support a damages action.

coercion test under the Fifth Amendment. Rather, they argue any such holding is irrelevant because the court also found petitioners' conduct – albeit based on facts interpreted in the light most favorable to respondents – violated the shocks-the-conscience test of the Fourteenth Amendment. (Houser Opp. 36-38.) As discussed in the next section, purely verbal conduct does not meet the established shocks-the-conscience standard as a matter of law. More importantly, whether or not petitioners' conduct met the test under the Fourteenth Amendment, the legal standard applied by the Ninth Circuit required no such finding. Instead, the Ninth Circuit made clear that even technical violations of the Fifth Amendment subject police to civil liability. Because that legal standard is wrong and proper exercises of discretion under the shield of qualified immunity depend on an understanding of "clearly established" law, guidance by this Court is critical. *Pearson*, 129 S.Ct. at 822.

III. REVIEW IS NEEDED TO DETERMINE WHETHER VERBAL CONDUCT ALONE CAN "SHOCK THE CONSCIENCE" FOR PURPOSES OF FOURTEENTH AMENDMENT LIABILITY.

This Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking . . . are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Specifically, in the context of the shocks-the-conscience test for police

conduct, the Court has stressed that substantive due process is not a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Consequently, "only the most egregious official conduct" suffices. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Here, the Ninth Circuit held words alone can shock the conscience. (Pet. App. 45-53.) This forces police officers to stand trial for engaging in the otherwise valid interview tactics used by petitioners (e.g., misleading suspects on evidence, offering help for cooperation), with no consideration of the officers' purpose or intent in the questioning. (Pet. 33-35.) This ruling is out of step with other circuits and must be reviewed. (*Ibid.*) *See also Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) (doubting use of shocks-the-conscience test "outside the realm of physical abuse"); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (in cases of mental harm, plaintiff must at least show intent to cause "severe mental suffering").

Respondents claim the Ninth Circuit correctly held the questioning here is conscience-shocking because some witnesses called it "psychological torture." (Houser Opp. 32-26.) But, as the district court noted, relevant "conduct must be viewed through a legal and constitutional prism that has been narrowly crafted by the Supreme Court, not through the very different prisms of a lay person and a psychiatrist." (Pet. App. 179.) And the district court reviewed the same evidence and found the questioning here "does not approach" the conscience-shocking level. (Pet. App. 182, 295.) Whatever the proper end result, the

difference of opinion between the appellate and trial courts alone demonstrates the inevitably shaky application of the substantive-due-process inquiry to cases involving no physical harm, much less the resulting loss of qualified immunity. *See Wilson v. Lane*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") Certainly this Court should not accept the Ninth Circuit's characterization of the interrogations just because a panel member was a former prosecutor. (*See* Crowe Opp. 25.)

In defending the Ninth Circuit's characterization of the interrogations here, respondents also ignore that all lower courts agreed the Escondido police department acted reasonably in arresting Crowe and Houser for murder. (*See* Pet. App. 48-53.) Perhaps in cases of excessive force a valid arrest is irrelevant, but where only verbal conduct is targeted, context is key. *See Lewis*, 523 U.S. at 850 (demanding "an exact analysis of circumstances before any abuse of power is condemned as conscience shocking"). In the case of Houser, for example, it is undisputed petitioners knew the following before the alleged conscience-shocking interrogation: (1) Houser's mother had called, unsolicited, to report one of his knives was missing; (2) the knife was found under Joshua Treadway's bed; (3) the knife fit the description of the murder weapon; and (4) Treadway told police Houser gave him the knife and said it was used in the murder Houser helped Crowe commit. (Pet. App. 25 n.5,

52-53.) Given that evidence, it would have been irresponsible for the police not to have arrested and questioned Houser in detail. Such facts are critical to evaluating petitioners' actions. *See Tinker v. Beasely*, 429 F.3d 1324, 1329 (11th Cir. 2005) (considering incriminating evidence in shocks-the-conscience analysis of interrogation).

Finally, respondents fail to cite a single case to justify civil liability based on verbal conduct. Rather, they cite authority addressing criteria, such as the suspect's age, for determining the voluntariness of a given statement for evidentiary purposes. (Houser Opp. 32-36, citing *In re Gault*, 387 U.S. 1 (1987); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).) But whether a confession should be admitted into evidence is distinct from whether the underlying questioning shocks the conscience. *See Tinker*, 429 F.3d at 1328 (distinguishing the two inquiries). If respondents were correct, then every suppression hearing would be a gateway to damages, which would hardly limit recovery to situations "too close to the rack and the screw," as this Court has urged. *Rochin v. California*, 342 U.S. 165, 172 (1952).

CONCLUSION

For all of the foregoing reasons and those described in the petition, petitioners respectfully submit that this Court should grant review.

Respectfully submitted,

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